No. 97-1414

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner.*

v.

CHARLES E. McDOWELL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S OPPOSITION TO RESPONDENT'S REQUEST FOR JUDICIAL NOTICE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-1414

ARTHUR CALDERON, Warden, *Petitioner*,

v.

CHARLES E. McDOWELL, *Respondent.*

INTRODUCTION

Following the filing of a Petition for Writ of Certiorari herein by Petitioner, and the filing of a Respondent's Brief in Opposition, Respondent Charles McDowell, Jr. has submitted a Respondent's Request for Judicial Notice of Petitioner's Judicial Admission (hereinafter "Req. Jud. Not.").

Invoking Rule 201 of the Federal Rules of Evidence and the Court's inherent power to govern its own proceedings, McDowell requests the Court to take judicial notice of two documents in *Morris v. Calderon*, CIV S-92-0483 EJG GGH P, an Eastern District of California habeas corpus matter: (1) the Magistrate Judge's Findings and Recommendations, and (2) the respondent warden's objections thereto. (Req. Jud. Not. at 1-2.)

The requested judicial notice is sought for the purpose of supporting McDowell's unsustainable contention that the State of California, in that district court case, has conceded that the Ninth Circuit's en banc

decision in the instant case, *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997), was correctly decided. (Req. Jud. Not. at 2-3, 4.)

Petitioner herein replies below that it has consistently been the State's position that the en banc decision in *McDowell v. Calderon* is wrong and contrary to law, that the State has not conceded any correctness to that decision in the district court document cited by McDowell, and that McDowell's Request for Judicial Notice is not well taken. (*See* Fed. R. Evid. 201(d) ("[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice").[1/]

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1. McDowell's instant effort is arguably more akin to a supplemental brief than a request for judicial notice of adjudicative facts pursuant to Federal Rule of Evidence 201. Counsel for Petitioner has been informed by the Office of the Clerk that, indeed, McDowell's Request for Judicial Notice is being treated as a supplemental brief. *See* Sup. Ct. R. 15(8).

ARGUMENT

PRESENTING A SUMMARY OF AN ERRONEOUS CIRCUIT COURT OF APPEALS DECISION IN A DISTRICT COURT DOCUMENT IS NOT A CONCESSION THAT THE APPELLATE CASE WAS CORRECTLY DECIDED

The core of the Ninth Circuit's en banc decision herein is that a "technically flawless" instruction governing mitigating evidence in the penalty phase of a capital case, *McDowell v. Calderon*, 130 F.3d at 838, "*became* inadequate" (Resp. Br. in Opp. at 16 (emphasis in original)) when the jury inquired of the court whether it could consider eight listed instances of McDowell's background as mitigation.

The State petitioned for certiorari not simply because the Ninth Circuit was wrong, but because, in addition, the matter at issue is important and the en banc majority's decision conflicts with those of other circuits and the state supreme court, reflects consistent Ninth Circuit violation of the "new rule" proscription of *Teague v. Lane*, 489 U.S. 288 (1989), and merits an exercise of the supervisory powers of this Court. *See* Sup. Ct. R. 10.

After the filing of the Petition for Writ of Certiorari herein, a Magistrate Judge in the Eastern District of California, on March 3, 1998, issued unpublished Findings and Recommendations in the capital habeas corpus case of *Morris v. Calderon*, CIV S-92-0483 EJG GGH P, which relied extensively upon the Ninth Circuit en banc decision at issue herein in the course of finding error in the state trial court's responding to the jury's penalty phase inquiry

by referring it to an erroneous written instruction on the possibility of parole. *Morris*, slip op. at 2-4, 6-11.[2/]

The respondent warden, on April 2, 1998, filed objections to the magistrate judge's Findings and Recommendations, contesting the conclusion that the alleged error had a substantial and injurious effect or influence on the jury's penalty determination. *Morris*, Respondent's Objections to the Findings and Recommendations of the Magistrate Judge Filed March 3, 1998 (hereinafter "Morris Objections").[3/] At the end of the respondent warden's argument is the following footnote:

> The Magistrate Judge mistakenly found that these claims were controlled by the Ninth Circuit's recent en banc opinion in *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997). Contrary to the Magistrate's findings, *McDowell* does not control in this case. In *McDowell*, the trial court's error was the failure to answer the jury's question as to whether it could consider certain factors as mitigating evidence. The court simply referred the jury to the court's previous instructions. The jury did not understand what evidence it could consider mitigating and the court's responses did nothing to clarify the problem. Since the court failed to answer the jury's question, the error went directly to the jury's consideration of the mitigating evidence in

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2. A copy of the Findings and Recommendation in *Morris* is attached to the Request for Judicial Notice as Exhibit A.

3. A copy of the objectives filed in *Morris* is attached to the Request for Judicial Notice as Exhibit B.

> *McDowell's* case. Since such consideration is an essential component of the Eighth Amendment's requirements for a rational and reliable death verdict, the error was prejudicial. Thus, the error in *McDowell* went directly to the jury's consideration of the mitigating evidence and the reliability of the verdict. *McDowell v. Calderon*, 130 F.3d at 838. The prejudice was inherent.
>
> In this case, the erroneously typed instruction did not affect the reliability of the death verdict. *McDowell* does not foreclose a prejudice analysis if it can be made. Unlike *McDowell*, there is no question that the jury in Petitioner's case understood its responsibility to consider the mitigating evidence. Furthermore, unlike *McDowell*, it can be determined that the erroneous instruction did not affect the outcome. There is no reasonable likelihood the jury applied the erroneous instruction in a manner that prevented consideration of relevant evidence of rendered the death verdict unreliable.

Morris Objections at 14 n.6.

The language and context of the quoted passage are inconsistent with McDowell's brash notion that some kind of concession has been made of the correctness of the Ninth Circuit's maverick determination in the instant case. The language upon which McDowell relies summarizes and seeks to distinguish; it does not approve or validate; at most, it implies recognition of existing precedent in the circuit and acquiesces therein for purposes of the limited confines of the specific effort to object to the magistrate's recommendations. After all, even though the Ninth Circuit's *McDowell* opinion undoubtedly was perceived as contrary to logic and precedent, and still subject to this

Court's discretionary rectification, because *McDowell* was distinguishable from *Morris*, and because the chances of a district judge's rendering a decision inconsistent with published in-circuit en banc precedent would be very small, it is more than understandable that a party would deal with the *McDowell* opinion by differentiating it rather than challenging it.

CONCLUSION

Contrary to McDowell's claim, the State has conceded nothing, the Ninth Circuit majority opinion remains a judicial anathema, and, if anything, the material presented to this Court in McDowell's Request for Judicial Notice corroborates the potential that opinion has for widespread negative impact and, accordingly, the appropriateness of granting certiorari herein.

Dated: April 14, 1998.

Respectfully submitted,

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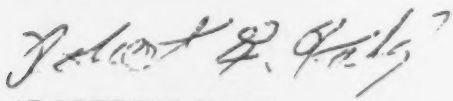

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

(5)

No. 1414

ARTHUR CALDERON, Warden,

Petitioner,

v.

CHARLES E. McDOWELL, JR.,

Respondent.

Respondent's Supplement

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S REQUEST FOR JUDICIAL NOTICE OF PETITIONER'S JUDICIAL ADMISSION

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 1414

ARTHUR CALDERON, Warden,

Petitioner,

v.

CHARLES E. McDOWELL, JR.,

Respondent.

RESPONDENT'S REQUEST FOR JUDICIAL NOTICE OF PETITIONER'S JUDICIAL ADMISSION

INTRODUCTION

This is a capital case, pending before this Court on Petitioner Arthur Calderon's Petition for Writ of Certiorari, which was filed on or about February 27, 1998. Respondent Charles E. McDowell, Jr., filed his Brief in Opposition on or about March 25, 1998. Petitioner is seeking review by this Court of the *en banc* decision of the Ninth Circuit Court of Appeals vacating McDowell's death sentence.

McDowell, by his undersigned counsel, hereby requests, pursuant to Rule 201 of the Federal Rules of Evidence and the Court's inherent power to govern its own proceedings,

that this Court take judicial notice of the file endorsed copies of the following two documents filed in the United States District Court for the Eastern District of California in the habeas corpus action entitled Morris v. Calderon, No. CIV S-92-0483 EJG GGH P: (1) the "Findings and Recommendations" filed by the Magistrate Judge on or about March 3, 1998, regarding certain of petitioner Bruce Morris' claims for relief (attached as Exhibit A hereto); and (2) the State's "Objections" thereto, filed on or about April 2, 1998 (attached as Exhibit B hereto).

In Morris v. Calderon, also a capital case, the petitioner has asserted, inter alia, a claim challenging the sufficiency of the trial court's response to an inquiry by the capital sentencing jury regarding an instruction that erroneously included a reference to "life with the possibility of parole." The Magistrate Judge recommended granting relief on the claim, citing the Ninth Circuit's *en banc* decision in this instant case, McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997).

In his objection to this recommendation the State has conceded that the Ninth Circuit's *en banc* decision in the instant case was correctly decided:

> Contrary to the Magistrate's findings, *McDowell* does not control this case. In *McDowell*, the trial court's error was the failure to answer the jury's question as to whether it could consider certain factors as mitigating evidence. The court simply referred the jury to the court's previous instructions. The jury did not understand what evidence it could consider mitigating and the court's response did nothing to clarify the problem. Since the court failed to answer the jury's question, the error went directly to the jury's consideration of the mitigating evidence in McDowell's case. Since such consideration is an essential component of the Eighth Amendment's requirements for a rational and reliable death verdict, the error was prejudicial. Thus, the error in *McDowell* went directly to the jury's consideration of the mitigating evidence and the reliability of the verdict. *McDowell v. Calderon*, 130 F.3d at 838. The prejudice was inherent.

Exhibit A

FILED

MAR - 8 1998

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE MORRIS,

Petitioner,

vs.

ARTHUR CALDERON,

Defendants.

No. CIV S-92-0483 EJG GGH P

DEATH PENALTY CASE

FINDINGS AND RECOMMENDATIONS

CLAIM 36 (IN PART); CLAIM 40

_____/

INTRODUCTION AND SUMMARY

In part of Claim 36 and in Claim 40[1], petitioner alleges that the transmission to the jury of a written instruction, which the parties agree was erroneous, during the penalty phase violated the Eighth and Fourteenth Amendments. Petitioner further argues that the trial judge compounded the error, when in response to a jury inquiry, he told the jury to reference the erroneous instruction. The court has broken out this claim from the remainder in the First

[1] Claim 40 (transmission of erroneous written instruction to the jury and subsequent erroneous clarification) completely duplicates part of the claim contained in Claim 36. Claim 36 contains an additional allegation collaterally pertinent here about the judge's inquiry into the numerical division of the jury. The court is puzzled about petitioner's organization of the erroneous written instruction claim, but in any event will not adjudicate here the numerical division claim.

Amended Petition (hereafter Petition) because the claim is perhaps the most problematic in the Petition, and the efficiency of the adjudication would be enhanced if the parties are working on objections, if any, while the court finalizes its Findings and Recommendations on the remaining claims. In addition, this penalty phase claim encompasses its own discrete facts and is not dependent on the other facts of the case.

The inescapable conclusion, in light of the binding, on-point authority of McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997) (en banc), is that this penalty phase claim should be found in petitioner's favor, and that the writ of habeas corpus be granted with respect to the penalty phase.

FACTS

Petitioner, Bruce Wayne Morris, was convicted of a grisly murder/robbery for which the prosecution sought the death penalty. Petitioner was convicted in the guilt phase of felony murder and the special circumstance of robbery in connection with the murder was found true. Claim 36 and 40 allege violations of the Eighth and Fourteenth Amendments during the time at which the jury was involved in penalty phase deliberation. The precise claim revolves about Special Jury Instruction No. 60.

The court and counsel addressed Instruction 60 during discussions regarding proposed penalty instructions:

> Court: With reference to special instruction no. 60, reasonable doubt, I have some questions about that. I want to give special instruction number 60, but I have a question mark.
>
> Mr. Condit [petitioner's counsel]: Yes, Your Honor. We would ask that it be given. I don't have a copy of that particular instruction.
>
> Mr. Rossi [prosecutor]: Neither do I.
>
> Court: "If you have a reasonable doubt as to which penalty to impose, death or life imprisonment–life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life in prison ***with*** the possibility of parole," citing People v. Cancino.
>
> Mr. Condit [petitioner's counsel]: We would–we think that's appropriate, Your

> Honor. I know the law in this area is a little unsettled, but we would submit that that's appropriate.
>
> Court: I have no–I have a yes. I want to give it but with question mark, and I will give it with a question mark. Defendant's Special Instruction Number 75, goes hand in hand with this Number 60, and the Court will be giving Number 75.

RT 5267-5268 (emphasis added).

During this conference, neither the trial court nor counsel realized the apparent typographical error in special instruction 60 even though the court read it out loud. Clearly, the error thus far was inadvertent.

It appears that when the trial judge read Instruction 60 to the jury, he realized the error. He corrected himself and read the instruction as it should have been read:

> If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life in prison ***with*** the possibility of–***without*** the possibility of parole.

RT at 5339. (emphasis added)

Unfortunately, the trial judge did not correct the written instruction before submitting it to the jury for their use during deliberations. CT 2504. Thus, any reference to the instruction by the jury would have given erroneous information about the possibility of parole.

It so happened that the jury had questions during the course of the penalty phase deliberations. The jury had a question about the eventuality of not being able to reach a decision, and a question about Instruction 60. The exact questions are contained within the Clerk's Transcript at 2530: "In the event this jury cannot decide 100% on the penalty phase of the case what would be the sentence imposed? Please explain noted page of instructions [Instruction 60]."[2]

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[2] Also, after the jury retired subsequent to the judge's response to their question, the jury questions were summarized for petitioner on the record. RT 5348. Instruction 60 was clearly referenced.

> Court: Mr. Lewis, the Court has been in receipt of your question, or questions. And before I respond to the questions, I have discussed them with counsel as well. Without telling me exactly how the jury stands one way or the other, can you give me some idea or give us an idea about the numerical count, how might it stand? Seven/five, six/six, four/eight?
>
> Juror Lewis: Approximately ten to two, Your Honor.
>
> Court: Do you feel as though if I allow you to continue to deliberate, you might be able to reach a decision in the matter?
>
> Juror Lewis: I think there's a possibility, your Honor.
>
> Court: I'm going to let you do that. The statutes provide for what happens in the event that you folks aren't able to reach a decision, but I can't tell you what that is at this point in time. So that's the answer to your first question. I am unable to tell you. ***The answer to your second question is that I feel as though the instruction itself is self-explanatory. And we would hope with that in mind, that you might be able to reach a decision.*** I suggest that you take as long as you might want to take. Don't rush. Please do not rush, all right?

RT at 5347-5348 (emphasis added).[3]

ANALYSIS

The claim involving the erroneous written jury instruction 60 was raised on direct appeal, and the California Supreme Court responded to the claim.

> In merely asking for an 'explanation,' the jury did not specify its concerns, if any, about the instruction. The reason for its inquiry may or may not have been the typographical error. No juror expressed on the record any belief or concern that defendant might receive parole. The generally phrased request for an explanation did not necessarily signify that jurors espoused any particular belief as to sentencing options. To the contrary, an examination of the entire record reveals that the jury was fully cognizant that there were only two available sentencing options-death and life imprisonment without possibility of parole-and that its solemn responsibility was to choose between them.
>
> First, the language of the instruction and the verdict options suggest that the jury understood both the task at hand and its consequences. In the first part of the instruction, the two sentencing options were correctly stated as death and life imprisonment without possibility of parole. The jury was directed to give the defendant the benefit of any reasonable doubt it might have 'as to which penalty to impose.' Because of the typographical error, the balance of the instruction is both logically inconsistent and physically impossible. The inconsistency is patent: one

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[3] Also, the judge, apparently, wrote on the question sheet presented by the jury; "The court feels the instruction is self-explanatory." CT 2530.

cannot logically give defendant the benefit of a doubt arising between two specified penalties by imposing a third penalty that is obviously less severe than either of the first two.

The physical impossibility arises because the jury was given two verdict forms and was directed to return only one of them as its penalty verdict. One form stated: 'We, the jury in the above-entitled cause, determine the appropriate penalty is Life Imprisonment Without Possibility of Parole and we so fix the punishment.' (Emphasis in original.) The other contained identical language except that the specified penalty was 'Death.' (Emphasis in original.) Thus, the jury could not reasonably have understood the instruction as introducing the prospect of a third verdict-life with parole-as to which it had no directions, instructions, or verdict form. The jury's decision to return the 'Death' form, properly signed and dated by the foreperson and attested to by all 12 jurors upon a poll, indicates that it had no reasonable doubt that death was the proper penalty to be imposed in defendant's case.

Second, from the beginning of the trial to its end, the sentencing options of death or life imprisonment without the possibility of parole were correctly and continually presented to the jury. In addition to individual voir dire, there were over 50 references to the sentencing options by the court and counsel. In each case, the option of life imprisonment without any possibility of parole was correctly stated to the jury.

During individual voir dire, each prospective juror was asked whether he or she could consider the sentencing options of death and life imprisonment without possibility of parole. When the guilt phase began, the sentencing options were again correctly presented both in introductory instructions and in defense counsel's opening statement. At the penalty phase, two lawyers argued for defendant. Together they referred to life imprisonment without possibility of parole some 28 times.

The defense argument focused on the devastating reality that defendant would never leave prison if the jury did not sentence him to death. Counsel stated: 'Let's take a look at the sentence of life imprisonment without the possibility of parole. That sentence means exactly what it says. His Honor, Judge Giffen, will instruct you on that.' He then graphically illustrated the prospect of a life without any possibility of freedom. Positing a series of decades-1990, 2000, 2010, 2020-he gave his own age and that of his children at the beginning of each decade and reminded the jury that defendant would still be in prison. He observed that defendant would receive a more severe sentence than Charles Manson or Sirhan Sirhan who, in contrast to defendant, were sentenced to life imprisonment with possibility of parole. He invited the jury to empathize with defendant who, regardless of the jury's verdict, would die in prison after spending the remainder of his life in a cell less than half the size of the jury box. The refrain was repeated again and again to dramatize the severity of the punishment defendant would inevitably receive even if the jury did not sentence him to death.

The penalty phase instructions mentioned life imprisonment without possibility of parole 11 times, stating it correctly each time. For example, the trial judge not only informed the jury of its sentencing options and their effects, it admonished jurors

> to consider no other possibilities: 'You are instructed that life without parole, that verdict, means exactly what it says. That the defendant shall be imprisoned for the rest of his life. And you are instructed that a death verdict means exactly what it says. That the defendant will be executed. For you to conclude otherwise would be to rely upon speculation or conjecture and would be a violation of your oath as a juror.' (Italics added.) And: 'It is the law of this state that the penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstance charged in this case has been specially found to be true.' (Italics added.) And again: 'The choice you make is not simply between good and bad, but between the punishment of life imprisonment without possibility of parole and death.' (Italics added.) And finally: 'To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.' (Italics added.)
>
> Thus, in all of the references to the possible penalties in this case by the court and counsel, only one-the mistyped instruction-incorrectly refers to life in prison with possibility of parole. Even that instruction stated the two alternative penalties correctly in its opening clause. There is no reasonable possibility that the jury ignored all 50 of these references in favor of a single exception which, as we have noted, was both an illogical and impossible verdict.
>
> Third, even the challenged instruction was correctly read to the jury, the error remained only on the typewritten copy. The jury was instructed that the text of the instructions as read to it controlled over delineations or modifications in any written copies of instructions it might request. As discussed above, all of the instructions read to the jury were correct and consistent as to the only two sentencing options.
>
> Focusing on the specific language of the erroneous instruction as a reasonable juror would and considering the context of defendant's trial (California v. Brown, supra, 479 U.S. at p. 541 [93 L.Ed.2d at pp. 939-940]), we conclude that there was no 'reasonable likelihood' the jury inferred that defendant might receive parole if he were not sentenced to death. (Boyde v. California, supra, 494 U.S. at p. ___ [108 L.Ed.2d at pp. 329-330, 110 S. Ct. at p. 1198].)

People v. Morris, 53 Cal. 3d 152, 229-230, 279 Cal. Rptr. 720, 767-768 (1991), disapproved on other grounds, People v. Stansbury, 9 Cal. 4th 824, 38 Cal. Rptr. 2d 394 (1995).

As fully explained below, the reason McDowell does not permit the court to adopt the decision of the state supreme court in this non-AEDPA case[4] in that, with due respect, the

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[4] The Antiterrorism and Effective Death Penalty Act. Thus, the court does not "presume the correctness" of the decision of the state supreme court, or ask whether the decision is an unreasonable application of *U.S. Supreme Court* authority, but rather applies a de novo review. In subjecting the issue to de novo review, this court is bound by the pronouncements of the Ninth

state supreme court asked the wrong question, and therefore, came to the incorrect conclusion. The issue here is not what a "reasonable jury" would have known, but given the on-the-record request for explanation, whether *this* jury was confused, or otherwise had a misperception of the law. In the absence of a jury question, the state supreme court would undoubtedly have been correct in its conclusion that a reasonable jury should not have been confused. For that question, the opinion of the state supreme court is persuasive. However, this jury asked for an explanation of the erroneous jury instruction, and while the state supreme court is again correct that extra-record evidence is inadmissible to show jury confusion, McDowell v. Calderon, 107 F.3d 1351, 1367 (9th Cir. 1997), vacated in part on other grounds, McDowell v. Calderon, 130 F.3d 883 (1997) (en banc), the record itself reflects the confusion. And, the only logical reason to ask a question about the instruction was the very fact that references inconsistent with the possibility of parole had been made.[5] Then, the trial judge expressly told the jury that the written instruction was self-explanatory– thereby significantly diminishing any inference that could be drawn about the correct conclusion from the other instructions and argument.[6]

In McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997) the Ninth Circuit addressed the issue of jury confusion during penalty deliberations in a capital case. In McDowell, the jurors had been adequately instructed on the relevant law and they had the written instructions with them. McDowell, 130 F.3d at 835. During deliberations, they sent a note to the trial judge

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Circuit, which might not necessarily be the case if the proceeding herein were governed by the AEDPA.

[5] The assertion by the state supreme court that we do not know why the jury had a question about Instruction 60 begs the obviousness of why any person would have been confused about the written instruction in light of its apparent inconsistency with the other instructions. In addition, the state supreme court appears to believe that the jurors had a question about what decision they were initially allowed to make. Not necessarily so–the jurors may well have been concerned about what would happen if they could not reach agreement, and the "self-explanatory" answer to the second question would have heightened that concern.

[6] Also, while the jury was told that the instructions as read controlled over any instructions with "delineations or modifications," there were none on the written question at issue.